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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1938

No. 329

GENE BUCK, individually and as President of the American Society of Composers, Authors & Publishers, *et al.*,
Appellants,

v.

PHIL H. GALLAGHER, individually and as State Treasurer of the State of Washington, *et al.*, *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

MOTION TO DISMISS

G. W. HAMILTON,
Attorney General of the State of Washington,

JOHN EGAN BELCHER,
Assistant Attorney General of the State of Washington.

Temple of Justice, Olympia, Washington.

MOTION TO DISMISS

G. W. Hamilton, as Attorney General of the State of Washington, one of the appellees, and attorney for all State officers named as defendants and appellees, moves the Court to dismiss the appeal filed herein, for the following reasons:

(1) Because the Governor of the State of Washington, an indispensible party defendant, has not been made a defendant in this action, which challenges the constitutionality of a statute of the State of Washington,

(2) Because certain state and county officers sued have either resigned or died, and their offices have been filled by others who have qualified therefor and in at least one instance one defendant named was not at the time of the commencement of the action a state officer but that office was held by another who was the qualified and acting treasurer of the state at the time.

(3) Because no citation on appeal has ever been served upon the Attorney General of the State of Washington nor upon his attorney of record herein, although he has appeared in said cause in his own behalf and by an assistant attorney general representing said attorney general and all state officers made defendants herein.

By Section 280, Title 28, U. S. C. A. (Judicial Code, Sec. 266, amended) it is provided:

"No interlocutory injunction suspending or restraining the enforcement, operation or execution of any

statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement * * * shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof. * * * upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a Circuit or district judge, and shall be heard and determined by three judges * * * Said application shall not be heard or determined before at least five day's notice of the hearing has been given to the governor and to the attorney general of the state, and to such other persons as may be defendants in the suit: * * *"

The Governor of the State of Washington, and a necessary party defendant, and whose duty it is to enforce all laws of the State of Washington, is neither sought to be enjoined nor brought into court by any legal process, so that neither this court, nor the three-judge court has acquired jurisdiction of his person or proper jurisdiction of the subject matter of this controversy.

Art. III, Sec. 5, of the Constitution of the State of Washington, provides:

"The governor may require information in writing from the officers of the state upon any subject relative to the duties of their respective offices and shall see that the laws are faithfully executed."

This proceeding was commenced in the United States District Court, Western District of Washington, Southern Division.

Rule 17 (b) District Court Rules provides:

"The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it is organized. In all other cases capac-

ity to sue or be sued shall be determined by the law of the state in which the district court is held; * * *"

The Governor of the State of Washington is charged in Art. III, Sec. 5 of the Constitution of the State of Washington with the duty of seeing "that the laws are faithfully executed."

Rule 5 (b), District Court Rules, provides:

"Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. * * *"

The order made and entered herein on June 9, 1937, by Judge Cushman reads, in part:

"It is further ordered that the complainants forthwith deliver to the Honorable Clarence D. Martin, Governor of the State of Washington, and each of the defendants copy of this order and, if such has not already been done, a copy of their bill of complaint and motion for injunction with supporting affidavits filed herein." (Tr. p. 210.)

Rule 10 (Supreme Court Rules) provides:

(1) "When an appeal is allowed a citation to the appellee shall be signed by the judge or justice allowing the appeal and shall be made returnable not exceeding forty days from the day of signing the citation, whether the return day fall in vacation or in term time, except in appeals from California, Oregon, Washington, Nevada, Idaho, Utah, Arizona, New Mexico, Colorado, Wyoming, and Montana, when the time shall be sixty days. The citation must be served before the return day."

The Attorney General's appearance was duly entered in the cause as was the appearance of E. P. Donnelly, Assistant Attorney General, as attorneys for all state officers named as defendants (Tr. p. 545) and thereafter, and before the entry of the order herein appealed from,

the said E. P. Donnelly was substituted by John E. Belcher, Assistant Attorney General, and neither the said G. W. Hamilton, Attorney General, nor John E. Belcher, Assistant Attorney General, was served with citation of application for nor allowance of appeal to this court, although the record of appearance attached to the transcript on appeal herein clearly shows such appearances.

The Constitution of the State of Washington, Art. III, Sec. 21, provides:

"The Attorney General shall be the legal adviser to all the state officers, and shall perform such other duties as may be prescribed by law. * * *"

By Rem. Rev. Stat., Sec. 112, the legislature of the State of Washington has prescribed the powers and duties of the Attorney General as follows:

"1. To appear for and represent the state before the Supreme Court in all cases in which the State is interested;

"2. To institute and prosecute all actions and proceedings for or for the use of the state which may be necessary in the execution of the duties of any state officer;

"3. To defend all actions and proceedings against any state officer in his official capacity, in any of the courts of this state or the United States.

"4. To consult with and advise the several prosecuting attorneys in matters erlating to the duties of their office, and when, in his judgment, the interests of the state require, he shall attend the trial of any person accused of crime, and assist in the prosecution."

This motion is based upon the record and files herein, and upon the affidavit of John E. Belcher, on file herein, a copy of which, omitting caption, is appended hereto.

G. W. HAMILTON,
Attorney General of the State of Washington,

JOHN EGAN BELCHER,
Assistant Attorney General of the State of Washington.

Temple of Justice, Olympia, Washington.

AFFIDAVIT

UNITED STATES OF AMERICA,
STATE OF WASHINGTON,
COUNTY OF THURSTON. } ss.

JOHN EGAN BELCHER, being first duly sworn, on oath deposes and says that he is a duly appointed, qualified and acting assistant attorney general of the State of Washington and is one of the attorneys of record for all state officers sued herein in their official capacities, and individually, and that the matters and things hereinafter set out are matters and things that have come to his knowledge from an examination of the official records, on file either in the office of the incumbents of said offices or are matters within his personal knowledge, to-wit:

That at the time of the commencement of this action in June, 1937, Clarence D. Martin was and now is the duly elected, qualified and acting Governor of the State of Washington.

That Otto Case, one of the defendants named herein as State Treasurer of the State of Washington, was not at the time of the commencement of this action and is not now and has not been the Treasurer of the State of Washington since the month of January, 1937.

That Phil Gallagher was elected State Treasurer of the State of Washington at the general election in the State of Washington in November, 1936; took office and qualified as such State Treasurer in the month of January, 1937.

That in the month of April, 1937, and prior to the commencement of this action in the United States District Court for the Western District of Washington, Sam Driver named in this action as District Attorney for Chelan County, Washington, was not the district or prosecuting attorney of said Chelan County, Washington, but had theretofore resigned said position and on April 1, 1937, said vacancy was filled by the Board of County Commissioners of said County of Chelan and one Lynn G. Gimmell was so appointed and qualified as such prosecuting attorney on the 1st day of April, 1937.

That one John D. Evans never was at any time prosecuting or district attorney for Yakima County, Washington, although named as such defendant herein.

That at the time of the commencement of this action in the United States District Court one Robert J. Willis was the then duly elected, qualified and acting prosecuting attorney for Yakima County, but thereafter resigned and was, by the Governor of the State of Washington, appointed judge of the superior court for that county on August 31, 1937; that said vacancy in the office of prosecuting attorney for Yakima County was thereafter and on September 7, 1937, filled by the Board of County Commissioners of that county by the appointment of one Lloyd L. Wjehl, who duly qualified and is is now, and at all times since has been the duly appointed, qualified and acting prosecuting attorney of said Yakima County.

That Ernest N. Hutchinson, one of the defendants named, was at the time of the commencement of this action tho duly elected, qualified and acting Secretary of State of the State of Washington, but the said Ernest N.

Hutchinson died on January 30, 1938, and the vacancy caused by his death was filled by the Governor of the State of Washington by the appointment of one Belle Reeves, who qualified on the 7th day of February, 1938, and has at all times since been and now is the duly appointed, qualified and acting Secretary of State of the State of Washington.

This affidavit is made in support of the motion of the Attorney General of the State of Washington for a dismissal of the appeal herein, on the ground of lack of proper parties.

Further affiant sayeth naught.

JOHN EGAN BELCHER,

Subscribed and sworn to before me this 3rd day of October, 1938.

JENNIE M. TATTERSALL,

{Notarial Seal} NOTARY PUBLIC in and for the State of Washington, residing at Olympia.